UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KARLA STEEVES,	)	
	)	
Plaintiff	)	
v.	)	Civ. No. 97-268-B
	)	
SHAW'S SUPERMARKETS, INC.,	)	
	)	
Defendant	)	

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

In this civil rights action, Plaintiff, Karla Steeves, alleges that Defendant, Shaw's Supermarkets, Inc., discriminated against her on the basis of her disability by failing to rehire her and failing to reasonably accommodate her disability. Plaintiff brings this action under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. (Count I) and the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. § 4551 et seq. (Count II). Before the Court is Defendant's Motion for Summary Judgment on all Counts of Plaintiff's Amended Complaint. For the reasons stated below, Defendant's motion is granted.

I. SUMMARY JUDGMENT

Summary judgment is appropriate in the absence of a genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is genuine for these purposes if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A material fact is one that has "the potential to affect the outcome of the suit under applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Facts may be drawn

from "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affadavits." Fed.R.Civ.P. 56(c). For the purposes of summary judgment the Court views the record in the light most favorable to the nonmoving party. See McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995).

II. BACKGROUND

Defendant hired Plaintiff as a Service Desk Clerk on October 10, 1989 and employed her in this position at its Waterville location until February 2, 1995. In May, 1994, Plaintiff began treatment with Richard J. Dubocq, M.D. ("Dr. Dubocq") for stiffness and pain in her neck and numbness and tingling in her hands and arms. On June 22, 1994, a "First Report of Occupational Injury or Disease" was filed pursuant to the Maine Workers' Compensation Act. In that report, Plaintiff informed Defendant that she was experiencing pain in her neck and shoulders, and that she had been diagnosed with carpal tunnel syndrome.

On the advice of her physicians, Plaintiff stopped working on August 1, 1994.[1] Defendant terminated Plaintiff on February 2, 1995[2] pursuant to its absentee policy. Plaintiff does not challenge her termination.

On October 4, 1995, Dr. Ahmed released Plaintiff to return to light duty work, with

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[1] Testing confirmed that Plaintiff had moderately severe bilateral carpal tunnel syndrome. Dr. Dubocq attributed Plaintiff's condition to repetitive motions associated with work. Plaintiff had carpal tunnel release surgery on September 8, 1994, and on November 9, 1994. In April 1995, Plaintiff had several surgeries related to a further diagnosis of incompetent discs at C5-6 and C6-7. In September, 1996, Altaf Ahmed, M.D. ("Dr. Ahmed"), diagnosed Plaintiff with significant myofascial pain syndrome.

[2] Both parties stipulate February 2, 1995, as the effective date of Plaintiff's termination, although employment documents found in the record indicate the effective date of Plaintiff's termination as February 22, 1995.

extensive restrictions on bending, twisting, standing, sitting, overhead work, lifting, and keyboarding. He also limited the number of hours she could work initially.[3] Plaintiff alleges that she contacted Annette Marcoux ("Marcoux"), one of Defendant's workers' compensation claims coordinators, on October 5, 1995 to express interest in returning to work for Defendant.

In December, 1995, Defendant referred Plaintiff to Jane Gerrish ("Gerrish"), an outside Disability Management Consultant, for three months of job placement assistance. After meeting with Plaintiff to discuss her restrictions, Gerrish sent Marcoux a copy of an Estimated Functional Capacity Form, completed by Dr. Ahmed on January 12, 1996. Dr. Ahmed stated that Plaintiff could not return to her "former job," but that she could return to other work subject to certain specified restrictions. Gerrish then spoke with Marcoux about Plaintiff's work restrictions and ability to work for Defendant. According to Gerrish, Marcoux told her that given Plaintiff's particular restrictions on standing and lifting, neither a Service Desk Clerk position nor a Cashier/Bagger position would be suitable for Plaintiff. Moreover, Marcoux allegedly told Gerrish that because of changes in hours and duties at the service desk, no positions were available in that department and no positions were likely to open up. Gerrish communicated this information to Plaintiff in January, 1996.

Defendant asserts, and Plaintiff does not contest, that in late 1995-early 1996, staffing needs at the service desk decreased dramatically. The available hours at the service desk were cut from 265 in 1994 (when Plaintiff still worked there) to approximately 170. Changes at the

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[3] On November 27, 1995, Dr. Ahmed revised his instructions and released Plaintiff to return to general secretarial duties or bookkeeping, including keyboarding and answering phones. He also increased the number of hours she could work and recommended an ergonomically correct work station with a forearm rest, appropriate seating, and headphones. Plaintiff's other restrictions remained the same.

service desk drove this reduction. Defendant ceased offering utility bill payment and video rental services at the service desk and, because the store had moved from a "tray accountability" to a "lane accountability" system of monitoring cashiers' money trays, the service desk was now responsible for tracking money from only twelve trays as opposed to eighty.

On September 11, 1996, Plaintiff wrote to Marcoux, asking if she could return to work at the Waterville store. She included a copy of her most recent work restrictions. On September 13, 1996, Marcoux wrote to Dr. Ahmed and requested that he review a Job Analysis of a Service Desk Clerk position and that he advise Defendant as to the appropriateness of the position for Plaintiff. Dr. Ahmed responded to Marcoux on September 17, 1996 stating that Plaintiff could perform the job functions of a Service Desk Clerk with minimal accommodation. Plaintiff had fewer restrictions at this point, limited to lifting, overhead reaching, and number of working hours.

Marcoux wrote to Plaintiff on October 10, 1996 stating that, while Defendant could make the accommodations recommended by Dr. Ahmed, at that time there were no service desk openings at the Waterville Shaw's. She further stated that she would contact Plaintiff if an opening at the Waterville service desk became available, and invited Plaintiff to contact her if she wished to be considered for employment in any other of Defendant's stores.

In an October 25, 1996 letter to Marcoux, Plaintiff's attorney confirmed that Plaintiff was "seeking reinstatement in her former position" at the service desk, acknowledged Marcoux's statement that no such positions were available at the Waterville branch, and requested information about service desk openings at other Shaw's stores.

On November 6, 1996, Defendant offered Plaintiff a Service Desk Clerk position at its

Bangor store. Plaintiff rejected this offer because the driving time to Bangor exceeded the thirty minute limit imposed on her by her physician.

In June, 1998, Defendant offered Plaintiff a job at the gas station booth at its Waterville location. This position involved taking money for gas through a window in a booth in front of the store. On June 11, 1998, Plaintiff, through her attorney, informed Defendant that she would not accept that position. Plaintiff explains that she feared for her personal safety in such a position and that she would not be close enough to a bathroom.[4]

Plaintiff asserts that she has been a "qualified individual with a disability" since October 4, 1995 and that several Service Desk Clerk openings at the Waterville Shaw's for which she was qualified have been available between October 4, 1995 and the present. Plaintiff alleges that Defendant unlawfully failed to hire her for these openings and failed to accommodate her physical condition because of her disability (carpal tunnel syndrome, incompetent discs at C5-6 and C6-7, and myofascial pain syndrome).

Defendant contends that it has not offered Plaintiff a position at the Waterville service desk since October 4, 1995 because no permanent Service Desk Clerk positions have become available.

III. DISCUSSION

Plaintiff contends that Defendant failed to reinstate her as a Service Desk Clerk and failed to reasonably accommodate her disability in violation of the ADA and the MHRA. Analysis of this discrimination claim proceeds in the same manner under each statute. See Abbott v.

[4] Plaintiff has stated that one of her medications causes her to need quick access to a restroom.

Bragdon, 107 F.3d 934, 938 (1st Cir. 1997) ("The Maine Supreme Court has indicated that analogous federal law informs the interpretation of the MHRA.") (citing Bowen v. Department of Human Services, 606 A.2d 1051, 1053 (Me. 1992)); Plourde v. Scott Paper Co., 552 A.2d 1257, 1261-62 (Me. 1989)); see also Soileau v. Guilford of Maine, Inc., 928 F. Supp. 37, 54 (D. Me. 1996), aff'd, 105 F.3d 12 (1st Cir. 1997) (MHRA claims turn on outcome of ADA claims).

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to the job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

When, as here, there is no direct evidence of discrimination, the burden shifting formula established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973), apply. See Dichner v. Liberty Travel, 141 F.3d 24, 29 (1st Cir. 1998). Plaintiff bears the initial burden of establishing a prima facie case of discrimination by proving that: (1) she has a disability within the meaning of the ADA; (2) she is qualified to perform the essential functions of the job, with or without reasonable accommodation; (3) she was subject to an adverse employment action by Defendant; (4) she was replaced by a non-disabled person or was treated less favorably than non-disabled employees; and (5) she suffered damages as a result. Id.

Once Plaintiff establishes a prima facie case, "the burden of production shifts to the defendant but requires, only, that the defendant articulate a legitimate, nondiscriminatory reason

for its action." Hodgens v. General Dynamics Corp., 963 F. Supp. 102, 106 (D.R.I. 1997) (citing McDonnell Douglas, 411 U.S. at 802-06). If the defendant does so, "the plaintiff must prove that the proffered reason is merely a pretext for disability discrimination." Id. The First Circuit has adopted the "pretext plus" approach to discrimination claims, requiring the plaintiff to "muster proof that enables a factfinder rationally to conclude that the stated reason behind the adverse employment decision is not only a sham, but a sham intended to cover up the proscribed type of discrimination." Dichner v. Liberty Travel, 141 F.3d 24, 30 (1st Cir. 1998). Thus, the plaintiff must show (1) that the employer's articulated justification for the adverse employment action is false, and (2) that the employer's true motive was discriminatory. See Champagne v. Servistar Corp., 138 F.3d 7, 13 (1st Cir. 1998); Garcia Ayala v. Bristol Myers-Squibb Mfg. Co., 992 F. Supp. 106, 107 (D.P.R. 1997); Braverman v. Penobscot Shoe Co., 859 F. Supp. 596, 601 (D. Me. 1994).

Defendant raises a number of arguments in its Motion for Summary Judgment. Defendant argues that (1) Plaintiff is not a "qualified individual with a disability" under the ADA because she is unable to perform the essential functions of the Service Desk Clerk job even with reasonable accommodation; (2) Plaintiff is judicially estopped from claiming to be a "qualified individual with a disability" under the ADA because she applied for and receives Social Security disability benefits; (3) Plaintiff is collaterally estopped from arguing that Service Desk Clerk positions were available between November, 1996 and May 31, 1997 because the Maine Workers' Compensation Board determined that no such positions were available during that period; (4) Defendant failed to hire Plaintiff for a Service Desk Clerk job because of its staffing needs at that time, not because it was motivated by discriminatory intent; (5) neither the ADA

nor the MHRA requires Defendant to create a vacancy or a position in order to reasonably accommodate Plaintiff; and (6) Plaintiff is not entitled to punitive damages because there is no evidence that Defendant acted with malice or reckless indifference toward Plaintiff. The Court need not resolve all these issues since it finds dispositive Defendant's contention that Plaintiff cannot sustain the burdens set forth in the McDonnell Douglas framework. Specifically, Plaintiff cannot satisfy the burden of demonstrating that Defendant's articulated legitimate, nondiscriminatory reason for not rehiring Plaintiff is mere pretext for discrimination. The Court agrees.

Viewing the evidence in the light most favorable to the non-moving party, Plaintiff has made out a prima facie case of disability discrimination under the ADA. She alleges that (1) she is disabled [5]; (2) at all relevant times, she has been qualified to perform the essential functions of the Service Desk Clerk job, with accommodation[6]; (3) Defendant has subjected her to adverse employment action in its continuing failure to hire her as a Service Desk Clerk or to reasonably accommodate her in that position; (4) non-disabled individuals were given Service Desk Clerk jobs; and (5) she has suffered damages as a result.

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[5] In its Motion for Summary Judgment, Defendant does not challenge whether Plaintiff's condition stemming from carpal tunnel syndrome, incompetent disks at C5-6 and C6-7, and myofascial syndrome constitute a "disability" under the ADA or the MHRA. Since the parties do not contest this issue, the Court assumes that Plaintiff is disabled for purposes of this motion.

[6] There is a genuine issue of material fact as to whether Plaintiff has at all times been qualified to perform the essential functions of the position with reasonable accommodation.

The presence of a genuine issue of material fact regarding Plaintiff's status as a "qualified individual with a disability," however, does not defeat Defendant's Motion for Summary Judgment. As discussed below, Plaintiff simply cannot meet her burden of demonstrating that Defendant's articulated legitimate, nondiscriminatory reason for its action is mere pretext for discrimination.

Defendant asserts that Plaintiff was not hired for a permanent Service Desk Clerk position at the Waterville Shaw's because no such positions were available. Since Defendant has articulated a legitimate, non-discriminatory reason for its decision, Plaintiff must offer the Court sufficient evidence to demonstrate that Defendant's articulated justification for failing to hire her is false and that Defendant's true motive was discriminatory. See Champagne, 138 F.3d at 13; Garcia Ayala, 992 F. Supp. at 107; Braverman, 859 F. Supp. at 601. Plaintiff has failed to meet this burden.

Plaintiff asserts that service desk positions for which she was qualified have been available at various times since October 4, 1995.[7] The record reflects that two Service Desk Clerks resigned during the period when Plaintiff sought employment: Kim Davis resigned on July 6, 1996, and Laura Daniels resigned on September 3, 1997.[8] As evidence that these jobs became available, Plaintiff cites portions of the deposition testimony of her former supervisor, Delores DeMerchant ("DeMerchant"), in which DeMerchant states that these two resigning employees were "replaced" in their positions by cross-trained workers from other departments. (DeMerchant Dep. at 10-11, 13-14, 18.) In light of the shift in staffing needs and practices that occurred in Defendant's customer service department after Plaintiff stopped working in 1994, however, the Court finds that the mere showing of available hours at the service desk is not

[7] On March 5, 1998, the Maine Workers' Compensation Board made a determination that no Service Desk Clerk positions or other positions suitable to Plaintiff's physical condition were available between November, 1996, and May 31, 1997, and that Defendant therefore had not failed to comply with its statutory obligation to reinstate Plaintiff to a suitable available position.

[8] Plaintiff also asserts that she should have been hired when a service desk employee resigned on September 23, 1995. However, that employee left almost two weeks before Plaintiff contacted Marcoux about her interest in returning to work. Plaintiff has offered no evidence that these hours were still available when she was ready to return to work.

equivalent to a showing of available permanent positions at the service desk.[9]

It is uncontested that, in late 1995-early 1996, Defendant drastically reduced the number of hours available to service desk employees because of changes in the nature of services provided at the customer service desk. In addition, Defendant cross-trained a number of employees from the checkout department to work at the service desk when necessary. Defendant apparently cross-trained these individuals intending that they would cover for service desk employees who were absent on a temporary basis (i.e. meetings, vacation, sick leave, etc.), but Defendant also acknowledges that some cross-trained employees were "rotated into the customer service desk on an as needed basis to fill . . . available hours." (DeMerchant Aff. ¶¶ 6-7.)

The hours of cross-trained employees would be split in some proportion between the customer service desk and the checkout department, and the proportions would change over time as staffing and scheduling needs required. Cross-training allowed Defendant the flexibility to staff the service desk without "lock[ing] [people] into the position." (Ouellette Dep. at 24.) Thus, when employee schedules or staffing needs changed, Defendant could return cross-trained employees to the checkout department and they would not lose the hours on which they relied. (See Ouellette Dep at 35.)

The Court is satisfied that, regardless of the use of cross-trained employees to fill available service desk hours, at no time since October 4, 1995 have there been available permanent "positions" per se. Rather, Plaintiff has merely presented evidence that, when hours

[9] Defendant reasonably concluded based on evidence in the record that Plaintiff only wanted to return to her Service Desk Clerk position, which did not involve moving to the checkout department when necessary. While Plaintiff argues that she would have accepted work involving other duties, the record reflects that only recently did Plaintiff express such flexibility to Defendant.

at the service desk opened up, Defendant's practice was to first draw upon its cross-trained staff for coverage. Defendant has explained satisfactorily that it sought versatile employees (those who could alternate between departments when necessary) to fill service desk hours, and that therefore, a Service Desk Clerk job involving service desk duties exclusively was not available.[10] (See Ouellette Dep. at 31, 37-38.) The Court is satisfied that, viewing the facts in the light most favorable to Plaintiff, Plaintiff has not offered sufficient evidence to permit a reasonable inference that permanent full-time or part-time positions solely involving service desk duties were in fact available and that Defendant's stated reason for not hiring Plaintiff is false.

Furthermore, Plaintiff cannot satisfy the second prong of the "pretext plus" standard, namely, the requirement of a showing of discriminatory animus on Defendant's part. No reasonable factfinder could conclude that Defendant's motivation in failing to hire Plaintiff was discriminatory in nature. Plaintiff's only proffered evidence of discriminatory animus is (1) the assertion that Defendant's stated reason for its hiring decision is false, a contention the Court finds without merit, and (2) the vague assertion that the Customer Service Desk Manager, Plaintiff's former supervisor, manifested animus toward Plaintiff because of her disability.

The crux of Plaintiff's animus evidence is found in the following statement describing what allegedly transpired in May, 1994 (over three years prior to the filing of this lawsuit), when Plaintiff gave her supervisor a note from Dr. Dubocq requesting an ergonomically correct chair and keyboard for Plaintiff:

> I brought Dr. Dubocq's note to work and gave it to the personnel coordinator who told me that she would "take care of it." Shortly after handing in Dr. Dubocq's

[10] The Court also observes that when Plaintiff's former position became available at Defendant's Bangor location, Defendant offered the job to Plaintiff.

> note, I noticed an abrupt change in the way I was treated by Ms. DeMerchant. Ms. DeMerchant had previously been very friendly and talkative toward me. We frequently discussed personal matters while at work. Based on the pattern of our relationship, I considered Ms. DeMerchant to be a friend. After I gave the note from Dr. Dubocq to Shaw's, Ms. DeMerchant rarely spoke with me at all, and when she did, her tone of voice was impersonal. Ms. DeMerchant tried to minimize contact with me, and when we did have contact, Ms. DeMerchant spoke to me in a short and often condescending manner. As a result of Ms. DeMerchant's reaction, I felt that I had done something wrong by giving Shaw's the note. The change in the way I was treated by Ms. DeMerchant would often lead me to tears, and I am still deeply hurt by the change in my relationship with Ms. DeMerchant.
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> Despite the fact that Shaw's had been given Dr. Dubocq's note, I was never given a different chair or keyboard. Rather, Ms. DeMerchant changed many of my hours from days to night. She also made me work standing up for six hours at a time, rather than working both sitting and standing as I had done previously.
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> (Steeves Aff. ¶¶ 4-5.)

The Court believes that the totality of this evidence falls far short of meeting Plaintiff's evidentiary burden of animus. Furthermore, the record suggests that Plaintiff's hours were switched from day to night and that more of her time was spent standing in an attempt by Defendant to decrease the time Plaintiff would have to spend typing at the computer. The extraordinarily weak evidence presented by Plaintiff to demonstrate animus when coupled with two alternative job offers, both of which Plaintiff rejected, belies Plaintiff's argument that Defendant's actions have been motivated by discriminatory animus.

III. CONCLUSION

For the reasons discussed above, Defendant's Motion for Summary Judgment is granted.

SO ORDERED.

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MORTON A. BRODY
United States District Judge

Dated this 8th day of September, 1998.